

The Administrative Law Judge (ALJ) found that claimant suffered injury by accident on June 18, 2005, that arose out of and in the course of her employment with respondent. The ALJ computed claimant's average weekly wage to be \$440, with a compensation rate of \$293.35. The ALJ found that claimant had a permanent partial impairment in the amount of 16 percent to the body as a whole. Further, the ALJ found that claimant accrued medical bills for treatment of her work-related accident in the amount of \$14,292.05. The ALJ ordered that respondent was responsible for payment of the medical bills claimant incurred for treatment of her injuries, subject to the allowance for the medical services in the medical fee schedule, to be determined at a separate hearing to be held post-award. He also found that claimant was entitled to nine weeks of temporary total disability compensation. The ALJ concluded that respondent produced an annual payroll of \$20,000 or more and was subject to the provisions of the Workers Compensation Act. The ALJ also ordered that the Fund was responsible for the payment of the award entered against the respondent.

The Board has considered the record and adopted the stipulations listed in the Award. The parties stipulated during oral argument to the Board that respondent was uninsured on the date of accident. In addition, the parties stipulated that the June 15, 2007, report by Dr. Terrence Pratt is part of the record and should be considered by the Board.

ISSUES

The Fund asserts that respondent's payroll for the year before claimant's injury was not over the amount of \$20,000 and, therefore, respondent was not subject to the provisions of the Workers Compensation Act. The Fund further contends that there is no evidence of respondent's financial inability to pay the award and, therefore, there is no evidence on which to assess liability against the Fund. Finally, the Fund contends the opinion of Dr. Pratt is more credible than the opinion of Dr. Douglas Rope and that his report should be used to determine claimant's impairment.

Claimant contends that the ALJ correctly found that respondent was subject to the provisions of the Workers Compensation Act and that since respondent is an uninsured and insolvent corporation that is unable and unwilling to pay the award, the Fund should pay the award. Claimant further contends that the award of 16 percent impairment is supported by the evidence in the record. Accordingly, claimant requests the Award entered by the ALJ be affirmed.

Respondent did not file a brief in this appeal. But during oral argument to the Board, respondent maintained that claimant did not suffer any injury due to her accident and even if she did, her injuries were not permanent.

The issues for the Board's review are:

- (1) Is respondent subject to the provisions of the Workers Compensation Act?
- (2) What is the nature and extent of claimant's disability?
- (3) Does the Fund have liability in this matter?

FINDINGS OF FACT

Claimant began working for respondent in 2004 as a bartender. On June 18, 2005, while working at respondent, she was injured when she hit the left side of her head on a Jagermeister machine. She described the accident as a forceful collision, after which she felt disoriented. Shortly thereafter, she called Margaret Smith, one of respondent's owners, and told her she needed to leave. The next day, claimant went to the emergency room at Olathe Medical Center with a severe headache, dizziness and nausea. She was also anxious and fearful. She had numbness in the left side of her face and down her left arm

and leg. A CT scan was done and was interpreted as normal. She was told to follow up with a neurologist and her regular primary physician. Claimant returned to the emergency room on June 23 with continuing symptoms and was diagnosed with a closed head injury with acute traumatic vertigo. An MRI performed on June 28, 2005, showed no abnormalities. Claimant was seen by a neurologist on July 20, 2005, and was diagnosed with post-concussion syndrome with possible underlying migraine.

An evaluation done in the neurology department of the University of Kansas Medical Center showed claimant had hyperesthesia in the left temporal region. She was placed on Tegretol, a very strong drug given for neuritic pain. She was told that anxiety is often a result of head injuries. Sometime in August 2005, she checked into the Rainbow Mental Health Center for three and a half weeks for a neurological assessment and for anxiety. She states she is still on medication, including medication for anxiety and depression, which she will be on for the rest of her life. She had never been treated for anxiety or depression before her injury and had no mental counseling before her accident, other than seeing a therapist a couple of times during her divorce.

Claimant contends she was incapacitated for several weeks after the accident. She tried to return to work in July 2005 but worked only about two hours and had to leave. She was released to work in late August, about 9 or 10 weeks after the accident. She did not return to work for respondent but was able to obtain employment in mid-September 2005 as a housekeeper at an assisted living facility. She went to school and earned her license as a practical nurse and is continuing her education to become a registered nurse. She says that she has a dull, low-grade headache on her left side every day. She has episodes that last 5 to 10 minutes where her left eye becomes blurry. This usually happens when she gets a severe, piercing headache on the left. She gets migraines about once a week.

Dr. Douglas Rope, a board certified internist, examined claimant on October 18, 2006, at the request of claimant's attorney. Claimant gave him a history of her accident and said she had left-sided pressure-type headaches for several weeks after the injury. She was seen the next day at Olathe Medical Center for dizziness and nausea. She was noted to be anxious. Claimant said her headaches were often associated with numbness in the left side of her face and down her left arm and leg. Claimant told Dr. Rope that her symptoms had remitted in the last several months to a point that she can live with. She continues to have localized pain and discomfort in the left temporal region, sometimes associated with 5 to 10 minute long episodes of blurring in the left eye. She sometimes has difficulty concentrating in her schoolwork because of her pain, especially if she reads too long or works at a computer more than 30-40 minutes at a time.

Upon examination, Dr. Rope found that claimant was alert and oriented. Her affect was normal with proper eye contact. Her speech was logical and goal-directed. Written communication ability was adequate. The cranial nerves showed normal extraocular musculature without nystagmus. Facial musculature and peripheral vision were normal.

Dr. Rope diagnosed claimant with having suffered a closed head injury on June 18, 2005, with residual localized headaches. She had a history of three to four months of neuralgia-type discomfort. She suffered from depression and anxiety secondary to her headache and migraine symptoms. He also diagnosed her with mild chronic cervical strain secondary to pain. He opined that claimant was at maximum medical improvement but said she is likely to continue to need medications to control her discomfort and maintain her functional capabilities. Based on the *AMA Guides*,¹ he opined that she had a permanent partial impairment of 15 to 17 percent to the body as a whole for pain that interfered with activity and required daily medication. He believed that due to her neuritic pain, she would have been unable to work for 8 to 10 weeks after her accident.

Dr. Terrence Pratt examined claimant on June 15, 2007, at the request of the Fund. She gave a history of her accident and medical treatment. She described her current symptoms as an occasional sluggish feeling or slight ache. She has blurred vision on the left intermittently. Her headaches are diminishing in frequency, occurring only monthly and lasting about three hours, if she can catch it early, with severe pain on the left side of her head and eye with photosensitivity and nausea.

After examining claimant, Dr. Pratt concluded that claimant had a mild traumatic brain injury or post-concussive syndrome with mild residual headaches, low level left temporal discomfort and intermittent left eye symptoms. He found no cognitive symptoms. Based on the *AMA Guides*, he rated her as having a 5 percent permanent partial impairment to the whole body for pain.

Claimant testified that when she started working for respondent in 2004, she was paid with cash and took her wages out of the cash register. Respondent kept a daily payout sheet, and she would write down on that sheet the amount of money she took as wages from the register. Sometime after the first of the year 2005, she was placed on the payroll and received payroll checks. She was paid \$7.50 per hour and averaged between \$220 and \$250 per week in tips. She received no fringe benefits. Her normal working hours were from 10 a.m. to 6 p.m., but she at times would work the evening shift.

When claimant started working for respondent, five people worked there, including at least one of respondent's owners, Margaret Smith. During the week day, one bartender would work during the day and one would come in for the evening. On Thursday nights, a backup waitress worked. The waitress was paid \$5 per hour. On Friday and Saturday nights, there were two bartenders, one who started at 6 p.m. and another who started at 9 p.m. The bar stayed open until 2 a.m.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Sandra Davis, who is claimant's best friend, testified that she worked as a part-time bartender at respondent. She was paid \$6 per hour plus tips. She testified that respondent kept a daily cash payout sheet for every shift and everything paid out of the register was recorded on that sheet. Ms. Davis said that her shift pay was taken out of the register and then recorded on the payout sheet. Other times, cash was taken out of the register for such expenses as playing the jukebox, to pay a route salesman for chips, to pay for alcohol if they had to go to a liquor store to replenish stock, and paying a disc jockey. During the two-year period Ms. Davis worked for respondent, she never received a written paycheck but always received a cash payout. She did not receive a Form W-2 in connection with her wages. She never filed an income tax return when she worked for respondent, and respondent did not deduct Social Security taxes or FICA taxes from her wages. As far as she knew, her wages were not reported to the IRS.

Respondent is owned by Marvin and Margaret Smith. Margaret Smith testified that respondent opened in 2000 and is a Kansas corporation. She said that respondent kept a sheet showing the beginning balance of the cash register, a list of alcohol sales and miscellaneous sales, and the ending cash balance. She enters this information into a computer for income tax records and then the worksheets are destroyed. She testified that all expenses are paid by check and there should be no cash payouts made from the register.

Mrs. Smith works at the bar every day. She said that in 2004 and 2005, the bar opened at 11 a.m. every day and would close at 2 a.m., unless business was slow. The opening bartender would come in to start business at 10 a.m. The bartenders were paid from \$5 to \$7 per hour. Normally there was a bartender during the day, and Mrs. Smith would work in the evenings. For a short period of time, they had waitresses on Friday and Saturday nights, but they only worked two or three hours. She does not remember how waitresses were paid but said they were probably paid an hourly wage plus their tips.

Mrs. Smith said that since the beginning, she and her husband have had to loan the respondent company money from their personal accounts. Respondent repays the loans. Neither she nor her husband have ever received a salary or distribution from the business. Respondent's income tax records from 2004 and 2005 show that the business operated at a loss for both years. Those records also show that in 2004, respondent paid \$9,416 in salaries and wages, and in 2005, respondent paid \$5,610 in salaries and wages.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Claimant's burden to prove coverage under the Act also includes whether respondent has the requisite payroll requirements as set forth in the Act.² K.S.A. 44-505(a)(2) exempts from application of the Kansas Workers Compensation Act the following:

any employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection.

K.A.R. 51-11-6 states:

In computing the gross annual payroll for an employer to determine whether they are subject to the workers' compensation act, all payroll paid by that employer to all workers shall be included. The computation shall include all payroll whether or not that payroll is paid to employees in the state of Kansas or outside the state of Kansas.

The provision in K.S.A. 44-505 excluding the payroll of workers who are members of the employer's family shall not apply to corporate employers.

A corporate employer's payroll for purposes of determining whether the employer is subject to the workers' compensation act shall be determined by the total amount of payroll paid to all corporate employees even when a corporate employee has elected out of the workers' compensation act pursuant to K.S.A. 44-543.

In order to be subject to the provisions of the Act, the above statute establishes a two-prong test. First, the employer must have had an annual payroll for the preceding calendar year greater than \$20,000. Secondly, the employer must reasonably estimate that it will have a gross annual payroll for the current calendar year of more than \$20,000 for all employees excluding family members.³

² *Brooks v. Lochner Builders, Inc.*, 5 Kan. App. 2d 152, 154, 613 P.2d 389 (1980).

³ See *Fetzer v. Boling*, 19 Kan. App. 2d 264, 867 P.2d 1067 (1994).

K.S.A. 44-532a(a) states:

If an employer has no insurance to secure the payment of compensation, as provided in subsection (b) (1) of K.S.A. 44-532 and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, or such employer cannot be located and required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. Whenever a worker files an application under this section, the matter shall be assigned to an administrative law judge for hearing. If the administrative law judge is satisfied as to the existence of the conditions prescribed by this section, the administrative law judge may make an award, or modify an existing award, and prescribe the payments to be made from the workers compensation fund as provided in K.S.A. 44-569 and amendments thereto. The award shall be certified to the commissioner of insurance, and upon receipt thereof, the commissioner of insurance shall cause payment to be made to the worker in accordance therewith.

ANALYSIS

Given the number of days per year and hours per day that the respondent business was open, and considering the amount of staffing testified to by claimant and Ms. Davis, whom the Board finds more credible than Mrs. Smith, and including cash payments and tips, the Board concludes that respondent's gross annual payroll during 2004 exceeded \$20,000 and that respondent should have reasonably expected its payroll to exceed \$20,000 in 2005 as well.

As a direct and natural consequence of claimant's work-related injury, she has suffered permanent impairment of function of 16 percent to the body as a whole as testified to by Dr. Rope, whom the Board finds most persuasive on this issue.

Respondent did not have workers compensation insurance coverage when claimant was injured. Furthermore, respondent is not financially able to pay claimant's award. The Kansas Workers Compensation Fund, therefore, is liable for that payment but is entitled to seek reimbursement for such payment from respondent.

CONCLUSION

(1) Respondent had a gross annual payroll of \$20,000 or more for all employees during the calendar year preceding claimant's accident, and respondent should have reasonably estimated a similar payroll for the 2005 calendar year. As such, respondent was subject to the Kansas Workers Compensation Act.

(2) As a result of her accident at work on June 18, 2005, claimant suffered a 16 percent permanent partial general disability.

(3) Respondent was uninsured on the date of accident and is financially unable to pay the award. Therefore, the Kansas Workers Compensation Fund is responsible for payment of this award, subject to its right of subrogation against respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated February 28, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Lawless, Attorney for Claimant
John Ivan, Attorney for Respondent
Peter J. Chung, Attorney for Kansas Workers Compensation Fund
Marcia Yates-Roberts, Administrative Law Judge